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Product Liability & Class Action

Manufacturer Can Be Strictly Liable for Products Made and Sold by Others, Says NJ Supreme Court

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On June 3, 2020, the New Jersey Supreme Court ruled that "manufacturers and distributors can be found strictly liable for failure to warn of the dangers of their products, including their asbestos-containing components and a third party's replacement components." Under a four-part test established by the Court, to prevail a plaintiff must prove: "(1) the manufacturers or distributors incorporated asbestos-containing components in their original products; (2) the asbestos-containing components were integral to the product and necessary for it to function; (3) routine maintenance of the product required replacing the original asbestos-containing components with similar asbestos-containing components; and (4) the exposure to the asbestos-containing components or replacement components was a substantial factor in causing or exacerbating the plaintiff's disease." Although the case focused on asbestos-related products, the impact on products liability for manufacturers and distributors may ultimately be much more far-reaching.

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The underlying suit, *Whelan v. Armstrong Int'l,* 242 N.J. 311 (2020), involved plaintiff Arthur Whelan's claims that he was exposed to asbestos while working on products that several defendants—including Ford Motor Co.—allegedly manufactured or distributed with asbestos-containing components integral to the function of the products. The trial court granted summary judgment for each defendant, and the Appellate Division reversed.

The Supreme Court of New Jersey, in a 5-2 decision, affirmed the lower appellate court's rejection of a 2014 decision in *Hughes v. A.W. Chesterton Co.*, where the Appellate Division declined to extend strict liability for failure to warn to manufacturers' and distributors' products' inherently dangerous replacement components. Justice Barry Albin wrote the opinion, which was joined by Chief Justice Stuart Rabner, and Justices Jaynee LaVecchia, Lee Solomon and Walter Timpone.

The failure-to-warn analysis, Justice Albin instructed, first assumes that the manufacturer or distributor knows the nature of its product and its injury-producing potential, then turns to whether it "acted in a reasonably prudent manner" in providing adequate warnings. Appellate Division panels in both *Hughes* and *Whelan* agreed that a product is defective where the manufacturer fails to provide adequate warning of the dangers of required replacement component parts, regardless of who manufactured the components. The divide was over whether imposing *strict liability* for the violation of that duty to warn "satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." The *Whelan* majority concluded it does.

The *Whelan* court felt that manufacturers and distributors are best positioned to exercise due care and spread the cost of losses caused by their dangerous products. "They can place proper warnings on their products, making those products safer 'at virtually no added cost and without limiting [the product's] utility,'" Justice Albin wrote, nodding to a longstanding concept from the Court's 1982 decision in *Beshada v. Johns-Manville Prods. Corp.* "Warnings about the dangers of the original asbestos-containing components could easily encompass the dangers of the required asbestos-containing replacement components integrated into the product during routine maintenance at later times."

"[I]mposing a duty to warn about the dangers of asbestos-containing replacement components, regardless of who manufactured those components, adds hardly any further burden or cost to the product manufacturers, who already have a duty to warn of the dangers of the original asbestos-containing components," Justice Albin wrote, emphasizing the relative ease for manufacturers or developers to cure the failure to warn. "It is only fair that the defendant manufacturers, who profit because the replacement components extend the life of their products, bear and spread the cost of the harm they caused." Justice Albin made clear that this duty to warn also applies to the third-party manufacturers of asbestos-containing replacement components.

In dissent, however, Justice Anne Patterson, joined by Justice Faustino Fernandez-Vina, called the majority's opinion "a departure from precedent."

"I view the majority opinion to erode the core element of a plaintiff's burden of proof in an asbestos case, to unfairly impose upon defendants liability premised on products that they neither manufactured nor sold, and to discourage the product-identification discovery that ordinarily leads to an equitable allocation of fault," Justice Patterson wrote.

Responding to the dissent's concerns, Justice Albin assured that "this opinion represents nothing more than a reasonable and logical extension of our evolving common law jurisprudence in asbestos cases." The majority merely resolves conflicting decisions of Appellate Division panels in ways consistent with common law's dynamic nature. And under Justice Albin's four-part test, plaintiffs still must "prov[e] medical causation related to defendants' products, including the required asbestos-containing replacement components that are integral to the functioning of those products." Moreover, he added, the decision incentivizes plaintiffs to identify asbestos-containing component manufacturers to maximize their source for damages payments, and incentivizes defendants to identify the same to share in the cost of damages.

The *Whelan* court seemed to limit its ruling to the facts at hand—that is, cases involving products that, by their design, are dependent on asbestos-containing replacement parts, even if those parts come from third parties. This is especially so where "[t]he manufacturer or distributor knows that the product's profitability depends on the length of the product's useful life and that the availability of replacement components is inextricably related to the product's continued functioning and overall value."

Whelan's requirement that a plaintiff show that the asbestos-containing part is "necessary" to the continued function of the original product appears to subtly depart from the U.S. Supreme Court's 2019 decision in *Air & Liquid Sys. Corp. v. DeVries*. There, in the maritime context, the U.S. Supreme Court held that a manufacturer has a duty to warn when, in relevant part, its product "required" incorporation of the asbestos-containing part. On its face, *Whelan*'s use of "necessary" reads more plaintiff-friendly than the U.S. Supreme Court's use of "required." This idea is bolstered when coupled with the N.J. Supreme Court's decision in *Beshada*, which imposed liability on manufacturers "for failure to warn of dangers which were undiscoverable at the time of manufacture." While the U.S. Supreme Court requires a plaintiff to show that a manufacturer knew or had reason to know of the integrated product's dangerous propensities and had no reason to believe that the product's users would realize that danger, a New Jersey plaintiff does not need to make such showing of foreseeability. This is because, under *Beshada* (and now *Whelan*), knowledge of the dangers inherent in the asbestos-containing components is imputed to defendant manufacturers. As a result, manufacturers cannot claim ignorance as a defense in New Jersey.

Still, the *Whelan* decision generally aligns with ones out of the U.S. Supreme Court as well as New York and Maryland. On the other hand, *Whelan* expressly split with jurisdictions that have found that a manufacturer does not owe a duty to warn of a third party's asbestos-containing replacement components later integrated into its product. Those jurisdictions, including Washington, Georgia and California, have recognized the "bare metal defense," which protects manufacturers from liability for injuries caused by asbestos-containing products that they did not manufacturer or distribute but are incorporated into their products or used as replacement parts.

In the asbestos realm, as the *DeVries* dissent warned, it remains to be seen (or, perhaps, litigated) how courts will resolve several "headscratchers," such as when a third-party product is "required" as opposed to just optimal or preferred; whether the duty to warn ends if the asbestos-containing part becomes less used over time; when a manufacturer is supposed to "know or have reason to know" that some supplement to its product has now made its product dangerous and how much cost and effort manufacturers must expend to discover the risks associated with third-party products others may be incorporating with their products; or whether a defendant must assume that third-party manufacturers will behave negligently in rendering their own warnings—to name a few.

Although *Whelan* dealt only with asbestos-containing parts, it is easy to imagine how the decision may lay the groundwork for expanding other areas of product liability. Indeed, the *Whelan* majority found its reasoning, at least in part, in *DeVries*, which did "not purport to define the proper tort rule outside of the maritime context." If courts do adopt *DeVries's* and *Whelan's* rules in non-asbestos arenas, manufacturers and distributors aiming to avoid litigation may need to prepare to spend time and money learning and writing warnings about the dangers of third parties' associated products, even if the original product is safe or, at least, far less dangerous than the third-party products. ■